INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statement	3
Argument	17
Conclusion	24

CITATIONS

Cases:

Davis v. *United States*, 214 F. 2d 594, certiorari denied, 353 U.S. 960	23, 24
Elkins v. *United States*, 364 U.S. 206	10
Jenkins v. *United States*, 325 F. 2d 942	17
Jones v. *United States*, 362 U.S. 257	24
Kinsella v. *Looney*, 217 F. 2d 445	17
Marchese v. *United States*, 374 U.S. 101	3, 22
Marchese v. *United States*, 264 F. 2d 892, certiorari denied, 360 U.S. 930	3, 9, 23
Marchese v. *United States*, 304 F. 2d 154, reversed, 374 U.S. 101	3, 10, 11
Medrano v. *United States*, 315 F. 2d 361, certiorari denied, 375 U.S. 854	23
Rios v. *United States*, 364 U.S. 253	10
Richards v. *United States*, 212 F. 2d 453	17
Sanders v. *United States*, 373 U.S. 1	22
Sanders v. *United States*, 297 F. 2d 735, reversed, 373 U.S. 1	11
United States v. *Hunter*, 162 F. 2d 644	17
United States v. *Robinson*, 361 U.S. 220	17
United States v. *Scales*, 249 F. 2d 368, certiorari denied, 356 U.S. 945	24

781-241—65——1

Cases—Continued

	Page
United States v. *Walker*, 197 F. 2d 287, certiorari denied, 344 U.S. 877	24
Warren v. *United States*, 311 F. 2d 673	24
Williams v. *United States*, 307 F. 2d 366	24

Constitution, statutes, and rules:

Fourth amendment	23
26 U.S.C. 4704(a)	11
26 U.S.C. 7237	11
28 U.S.C. 2255	2, 3, 4, 9, 10, 15, 16, 17, 23
47 U.S.C. 605	9
Federal Rules of Criminal Procedure:	
Rule 35	2, 16, 17
Rule 45(b)	17

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 157

MICHELE MARCHESE, PETITIONER

v.

UNITED STATES OF AMERICA AND PRESTON SMITH, WARDEN OF THE UNITED STATES CORRECTIONAL INSTITUTION AT TERMINAL ISLAND, CALIFORNIA

JESSE DEL BONO, PETITIONER

v.

UNITED STATES OF AMERICA AND R. W. MAY, WARDEN OF THE UNITED STATES CORRECTIONAL INSTITUTION AT TERMINAL ISLAND, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (1 R. 4–35 [1]; Pet. App. 6–46) is reported at 341 F. 2d 782.

[1] The record is in ten volumes, to which we shall refer as "R." preceded by the volume number. Volumes 4–8, inclusive,

JURISDICTION

The judgments of the court of appeals were entered on February 10, 1965 (1 R. 36, 37). A petition for rehearing (Pet. App. 47-53) was denied on March 4, 1965 (1 R. 38; Pet. App. 54). The petition for a writ of certiorari was filed on May 19, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court had authority to reduce petitioners' sentences after the expiration of the 60-day period prescribed by Rule 35 of the Federal Rules of Criminal Procedure.

2. Whether the court of appeals properly reversed, as without substantial support in the record, the district court's conclusion that petitioners' convictions were procured by the prosecutor's suppression of relevant evidence.

3. Whether the court of appeals' disposition of petitioners' appeals was inconsistent with this Court's mandate on remand.

---

contain the reporter's transcript of the original criminal trial, at which petitioners were co-defendants. Volumes 2 and 3 consist of the clerk's transcript and the reporter's transcript, respectively, of the proceedings in the district court relating to petitioner Marchese's collateral attack on his conviction (denominated a petition for a writ of habeas corpus, but treated throughout as in substance a (second) motion to vacate sentence under 28 U.S.C. 2255). Volumes 9 and 10 are the clerk's and reporter's transcripts, respectively, of the district court proceedings on petitioner Del Bono's motion to vacate his conviction under 28 U.S.C. 2255. Volume 1 contains the consolidated proceedings in the court of appeals.

STATEMENT

In 1958, following a joint trial in the United States District Court for the Southern District of California, petitioners were convicted of offenses against the narcotics laws, and each was sentenced to ten years' imprisonment. In 1959, the convictions were affirmed, *Marchese* v. *United States*, 264 F. 2d 892, and petitions for writs of certiorari denied, 360 U.S. 930. In 1960, a motion by petitioner Marchese, under 28 U.S.C. 2255, to vacate his conviction was denied by the district court, from which order no appeal was taken. In 1961, a petition by Marchese for a writ of habeas corpus, which has been treated in these proceedings as in substance a second motion to vacate under 28 U.S.C. 2255,[2] was denied, and the court of appeals, in 1962, affirmed. *Marchese* v. *United States*, 304 F. 2d 154. On June 10, 1963, this Court vacated the court of appeals' judgment and remanded the case to the district court "for reconsideration in light of *Sanders* v. *United States*, 373 U.S. 1." *Marchese* v. *United States*, 374 U.S. 101. On September 30, 1963, following an evidentiary hearing, the district court entered an order (1) reducing Marchese's sentence to five years and directing his immediate release (2 R. 181–182; Pet. App. 1–2), and (2) ruling that Marchese had been denied a fair trial by reason of the

[2] The institution in which Marchese was then confined (the United States Correctional Institution at Terminal Island, California) is located in the same district in which petitioners' trial occurred (2 R. 2–3, 178). (He was later transferred to the United States Penitentiary at Leavenworth, Kansas (2 R. 99).)

prosecutor's failure to disclose relevant evidence to the court and jury (Pet. App. 23, 25, 28). On December 20, 1963, the same court, in a proceeding under 28 U.S.C. 2255 brought by petitioner Del Bono, entered a like order as to that petitioner (9 R. 42–43; Pet. App. 3–4). On consolidated appeals by the government, the court of appeals reversed these orders and directed that both petitioners be remanded to custody (1 R. 36, 37).

The relevant facts are as follows:

1. The indictment charged petitioners, in one count, with conspiring to violate the narcotics laws, and, in nine counts, with making three illegal sales of heroin—on January 30, February 7, and March 13, 1958 (7 R. 542–549). Marchese was convicted on all counts, Del Bono on the conspiracy count and the counts relating to the March 13 sale (8 R. 753–754).[1] Each was sentenced to ten years' imprisonment on each of the counts on which he was convicted, the terms to run concurrently (8 R. 776, 779).

The evidence adduced at the trial (see the government's brief in opposition to certiorari, Nos. 922 and 898 Misc., Oct. Term, 1958, pp. 4–7) showed that petitioner Marchese, on the three dates alleged in the indictment (January 30, February 7, and March 13, 1958), sold heroin to Donald Sussman, a user of narcotics, who, during this period, was acting as a government informer. Sussman had been selling drugs on consignment for Marchese for some four years previously and had been arrested shortly before January

[1] Del Bono was acquitted on the substantive counts relating to the other two sales (8 R. 754).

30. During the next six weeks he cooperated with government officers in a joint federal-state investigation of Marchese's narcotics activities. The government's proof consisted in part of incriminating statements made to Sussman by Marchese in the apartment of a Miss Nichols, where petitioner also lived. These statements had been overheard by two of the officers through the use of a radio transmitter concealed on Sussman's person. Other evidence consisted of statements made by Marchese to Sussman over the telephone, which one of the officers overheard by placing his ear next to the receiver with Sussman's permission.

The March 13 sale related to a two-pound consignment of heroin, valued at $11,500. Petitioner Del Bono was seen by the narcotics officers placing a bag containing the narcotics in the trunk of a 1941 Dodge automobile, which Marchese had told Sussman would be found (with the narcotics in it) at a specified time and at a specified street corner in Los Angeles. Del Bono was seen driving the car to this location at this approximate time, parking it, and a moment later being driven from the scene by Marchese in another automobile. Sussman, pursuant to his arrangement with Marchese, removed the heroin from the trunk of the parked car and immediately turned it over to the narcotics agents, who had witnessed the entire transaction (4 R. 61, 77–78; 5 R. 168–169, 176–177; 6 R. 256, 306–308).

Through the normal processes of examination and cross-examination of witnesses (principally Sussman and Malcolm Richards, the federal narcotics agent in

charge of the investigation), it was brought out at the trial that Sussman had been arrested by the federal agents for a narcotics offense on January 29, 1958, the day preceding the commencement of his cooperative activities on behalf of the federal and State agents (4 R. 18–19, 62; 6 R. 360); that a year and a half previously he had been convicted in a California State court of another narcotics offense, for which he was on probation at the time of his federal arrest (5 R. 94–95; 7 R. 432–433); that following his federal arrest he was taken to the offices of the Narcotics Bureau in Los Angeles, where agent Richards had a conversation with him in the presence of other federal agents and representatives of the State narcotics authorities (4 R. 18); that Sussman knew at that time that if he cooperated with the authorities in their investigation of other persons he would "probably" get a lighter sentence in his own case, and that he decided to cooperate with the agents in the hope and for the purpose of getting a lighter sentence (7 R. 419, 434–435); that following his conversation with the agents he was taken before a federal committing magistrate and released on his own recognizance (4 R. 19; 5 R. 95); that during the ensuing period of approximately six weeks, in which he cooperated with State and federal authorities in gathering evidence against petitioners, he received periodic payments totaling approximately $600 from a government fund established for such purposes, in order to support himself and his family (4 R. 83–86; 5 R. 108; 7 R. 435–436); that during the period of

his cooperative efforts he continued his personal use of narcotics, using for this purpose a supply he had accumulated prior to his arrest (4 R. 72; 5 R. 96; 7 R. 411-412, 436-437); that on March 26, 1958—between the date of petitioners' arrest and the commencement of their trial—he pleaded guilty before Judge Byrne, another judge of the court in which petitioners were on trial, to a narcotics charge arising out of his federal arrest, and was sentenced to two years' imprisonment (5 R. 95, 97, 99; 7 R. 450); that Judge Byrne recommended, at the time he imposed sentence, that Sussman be sent to a hospital for treatment of his narcotics addiction (5 R. 97); and that, pursuant to this recommendation, he was sent to the United States Public Health Service Hospital in Fort Worth, Texas—from which institution he was brought to Los Angeles to testify at petitioners' trial (7 R. 412, 450-541).

Agent Richards was asked on cross-examination whether he had made "some kind of an agreement with" Sussman during their conversation at the Narcotics Bureau offices. The prosecutor, Assistant United States Attorney Bruce Bevan, objected to the question on the sole ground that it "call[ed] for a conclusion of the witness," but made it clear that he had "no objection to the facts coming out." The objection was sustained and the matter was not further pursued (4 R. 62-63). Subsequently in the course of his cross-examination, Richards testified that Sussman had not been told by him, or by anyone in his presence, that he "would receive a lighter sentence"

for his federal offense if he would cooperate with the agents in gathering evidence against Marchese (5 R. 107).[4]

Under redirect examination by the prosecutor, Richards was asked whether he had ever had a conversation regarding Sussman with Sussman's State probation officer following Sussman's federal arrest and the commencement of his cooperative activities. Counsel for Marchese objected. The court, after initially sustaining the objection, permitted the witness to answer "yes or no" when the prosecutor pointed out that he had not asked for the content of the conversation. Richards answered that he had had such a conversation. The prosecutor then asked Richards if he knew whether the probation officer had spoken regarding Sussman to the Superior Court judge who had sat in Sussman's State case. Counsel for Marchese objected to the question on the ground that the matter which the prosecutor was attempting to bring out was "completely immaterial." The objection was sustained (5 R. 111–112).

Later in his redirect examination of Richards, the prosecutor, directing Richards' attention to the fact that he had stated on cross-examination that Sussman had not been told in Richards' presence that he would receive a lighter sentence for his federal offense if he cooperated, asked whether he had had any conversation with Sussman to the effect that "the United States Attorney would be contacted to determine

---

[4] This statement of Richards' is the principal testimony claimed by petitioners to have been perjurious. See *infra*, pp. 19–21.

what type of counts would be filed against him in the event his assistance was rendered." Counsel for Marchese objected to this question also—on the ground that it was "leading and suggestive" and involved "improper redirect examination." The objection was sustained (5 R. 112–113).

2. The grounds of petitioners' direct appeals from their convictions were (1) that the use of evidence obtained by the agent's "interception" of telephone messages between Marchese and Sussman was forbidden by 47 U.S.C. 605 (the anti-"wiretap" provision of the Communications Act of 1934), (2) that the evidence was insufficient to support the verdicts, (3) that petitioners had been entrapped into committing their offenses, and (4) that the use of the radio transmitter concealed on Sussman's person violated the accused's constitutional rights (2 R. 94–96; Pet. App. 18–19). The convictions, as previously noted, were affirmed on appeal, and petitions for writs of certiorari were denied, 264 F. 2d 892; 360 U.S. 930.

3. On November 16, 1960, petitioner Marchese filed in the district court a motion to vacate his conviction under 28 U.S.C. 2255—urging, among other grounds, that the trial had been unfair because of "misconduct of the prosecutor" in presenting "unreliable and inadmissible evidence" (2 R. 97–98). The motion was denied without hearing, and a motion for reconsideration was denied, no appeal being taken from either judgment (2 R. 4, 98). On June 20, 1961, Marchese filed the petition for a writ of habeas corpus which gave rise to the instant proceedings (2 R. 2–47). The

petition enumerated six "points and grounds" for granting the relief sought (2 R. 13–14). The third of these—the only one requiring detailed mention at this time[5]—was that the prosecutor had "actively participat[ed] in the suppression of the truth" and "fail[ed] to disclose the truth" concerning "the obvious agreement * * * between Donald Sussman and the Federal and State authorities" (2 R. 13).

On June 29, 1961, the petition was denied without a hearing (2 R. 54), and on May 31, 1962, the court of appeals affirmed. *Marchese* v. *United States,* 304 F. 2d 154. Treating the petition as a second motion to vacate under 28 U.S.C. 2255, the court held that it was defective on its face for the reason (among others) that it failed to explain why the allegedly new grounds relied on could not have been asserted in the earlier proceedings or to allege that the petitioner had been previously unaware of the significance

---

[5] Ground 1—that "the use of 'silver platter' evidence" at the trial deprived the accused of due process of law (2 R. 13, 14–16)—was based on a misconception of the so-called "silver platter" doctrine (see *Elkins* v. *United States*, 364 U.S. 206, and *Rios* v. *United States*, 364 U.S. 253); and was subsequently formally abandoned (Reply Brief of Appellee Michele Marchese, No. 19172, C.A. 9, p. 33).

Grounds 2, 4, and 6 involved, respectively, renewal of the previously-urged contentions relating to entrapment, the use at the trial of evidence derived from the concealed radio transmitter, and the evidence based on the "intercepted" telephone messages (2 R. 13, 14, 17–20, 25–35, 40–43).

Ground 5 challenged the legality of Marchese's arrest and of the alleged "search" of Del Bono's automobile (2 R. 13, 36–40). It presented no issue properly cognizable on collateral attack and was furthermore unsound on its merits. See *infra*, pp. 23–24, including note 18.

of the relevant facts. 304 F. 2d at 156–157. For this aspect of its holding, the court cited its prior decision in *Sanders* v. *United States*, 297 F. 2d 735, which was subsequently reversed by this Court in *Sanders* v. *United States*, 373 U.S. 1. On June 10, 1963, this Court vacated the court of appeals' judgment and remanded the case to the district court "for reconsideration in light of *Sanders* v. *United States*, 373 U.S. 1." *Marchese* v. *United States*, 374 U.S. 101.

4. On September 4 and 9, 1963, an evidentiary hearing on Marchese's petition was held in the district court before Judge Thurmond Clarke, the presiding judge at petitioners' trial (3 R. 1–70). The court records, federal and State, relating to the disposition of the narcotics charges against Sussman were received in evidence (3 R. 17–21, 65, 68–70). These showed that on March 26, 1958, Sussman pleaded guilty before Judge Byrne to an information charging a violation of 26 U.S.C. 4704(a) and 7237, for which he was sentenced to two years' imprisonment with the recommendation that he be hospitalized for his addiction (3 R. 65, 68–69), and that on April 30, 1958, the California Superior Court for Los Angeles County revoked Sussman's probation for his State narcotics offense and sentenced him to a year's imprisonment to run concurrently with his federal sentence (3 R. 17–18). The State court's action—except as to the length of the sentence imposed—was pursuant to a recommendation of the court's probation officer, Karl Holton (3 R. 19–20).

Agent Richards testified at the hearing that he told Sussman, following the latter's federal arrest, that anything Sussman might do to cooperate with government authorities in bringing about the arrest and conviction of his "source of supply" (Marchese) would be brought to the attention of the United States Attorney, that it would be up to that officer to "go along from there," and that he (Richards) "couldn't promise [Sussman] anything" (3 R. 13). Richards further testified that Sussman told him at that time about his pending State proceeding for a narcotics offense and that he (Richards) advised Sussman that if the latter would cooperate he would speak to the State officers on Sussman's behalf (*ibid.*). Richards thereafter did speak to Sussman's probation officer (Mr. Holton) and "put the facts before him"—*i.e.*, he informed Holton that Sussman had consented to cooperate in the investigation of Marchese (3 R. 13–14, 35, 36–37). Richards also testified that some time prior to the imposition by Judge Byrne of Sussman's two-year federal sentence Richards informed the probation officer attached to the federal court that Sussman was cooperating with the government authorities (3 R. 22–23). The witness also again testified, as he had testified at the trial, that he at no time promised Sussman that he would get a lighter sentence for his federal crime if he would cooperate (3 R. 24).

Mr. Bevan, the prosecutor, testified that he drew the federal information to which Sussman pleaded guilty before Judge Byrne; that the charge (commonly called a "tax count") was for a less serious

offense than Sussman could have been prosecuted for on the basis of the available evidence; that he (Bevan) had no intention of suppressing evidence at petitioners' trial; and that, to his best knowledge, all prosecution witnesses had testified truthfully (3 R. 60–62, 65–66).

5. On September 30, 1963, the district court entered the following judgment: It ordered that Marchese's sentence of ten years' imprisonment on each count, to run concurrently, be "modified, reduced and corrected" to five years on each count, to run concurrently, and, it appearing that he had served more than four years of his sentence and had earned sufficient good-time credit while in prison to make his immediate release appropriate, that Marchese be forthwith released from custody (2 R. 181–182). The court contemporaneously ruled (inconsistently) that "the constitutional rights of [Marchese] to a fair trial were denied and so infringed upon as to render the judgment subject to collateral attack" (2 R. 179). Findings of fact and conclusions of law, drafted by Marchese's counsel and adopted by the court in the form submitted (3 R. 78–79, 130–132), were entered (2 R. 172–179).* These findings and conclusions—except for Finding of Fact XII and Conclusion of

*During the colloquy between court and counsel, before the entry of the formal order, findings, and conclusions, government counsel repeatedly asked the court to state on what ground or grounds it considered Marchese's conviction vulnerable to collateral attack, but was unsuccessful in eliciting an answer (3 R. 77, 78, 81–82, 93–94, 95–96, 124, 125, 129). See the opinion below at Pet. App. 20.

Law I'—are set forth in full in the opinion of the court of appeals (Pet. App. 21–28) and need not be repeated here. Briefly summarized—insofar as they relate to the alleged suppression of evidence by the prosecutor—the findings were as follows: that, although agent Richards denied at the trial that he had made any promise to Sussman to "try to obtain some consideration for" the latter if he would cooperate in bringing about the arrest and conviction of Marchese, "some such promise, arrangement or assurance" was made (Finding of Fact I, Pet. App. 21–22); that when Sussman testified on cross-examination that he knew he would "probably" get a lighter sentence for his federal offense if he cooperated with the narcotics agents, he "had already been granted great leniency, both by the Government and the Superior Court of the County of Los Angeles," and the prosecuting attorney "should then have disclosed to the court and jury what had been done for" Sussman (Findings IV and V, Pet. App. 22–23);[8] that the prosecutor, "by a technical objection," "prevented disclosure of any arrangement between Sussman and Agent Richards"[9]

[7] Finding of Fact XII was that Marchese had served approximately four years and four months of his ten-year sentence and that under the rules of the Bureau of Prisons he had earned sufficient good time to entitle him to be released if his sentence was reduced to five years (2 R. 178). Conclusion of Law I (*ibid.*) has no present relevance. It appears at page 2, note 2, of the petition for a writ of certiorari.

[8] The acts of "leniency" referred to were summarized in Findings II and III, Pet. App. 22.

[9] This finding referred to the prosecutor's objection to the question of defense counsel as to whether Richards had made "some kind of an agreement with" Sussman—on the ground that the question called for a conclusion of the witness (*supra*, p. 7).

(Finding VI, first paragraph, Pet. App. 23); and that the failure of the prosecutor to disclose to the court and jury the disposition which had been made of Sussman's State and federal cases "denied [Marchese] the fair trial to which he was entitled" (Finding VI, last paragraph, Pet. App. 25).

6. On November 12, 1963, petitioner Del Bono filed in the district court a motion under 28 U.S.C. 2255 to vacate his conviction (9 R. 2–18). The motion, his fourth under that section (see 9 R. 4, 24–25),[10] invoked two of the six "points and grounds" on which Marchese's petition for a writ of habeas corpus was predicated (see *supra*, pp. 9–10). The first of these—the only one now relevant[11]—was the same as Marchese's third ground, *viz.*, that the prosecutor had suppressed relevant evidence at the trial (9 R. 10–13). At a hearing (10 R. 1–54)—also held before Judge Clarke—it was stipulated that all of the evidence received at the hearing on Marchese's petition would be considered also for the purposes of Del Bono's (10 R. 22–24). On December 20, 1963, the court made findings of fact and conclusions of law (9 R. 34–41), and entered a judgment (9 R. 42–43), which, with immaterial variations, were identical with the findings, conclusions, and judgment entered as to Marchese.

---

[10] No appeals were taken from the prior orders of denial (9 R. 25).

[11] Del Bono's second ground—the same as Marchese's fourth (see note 5, *supra*, p. 10)—related to the use at the trial of evidence derived from the concealed radio transmitter attached to Sussman's person during certain of Sussman's conversations with Marchese (9 R. 13–16). The latter issue, as noted at page 9, *supra*, was one of the issues litigated on petitioners' direct appeals from their convictions.

7. On appeal by the government from each of these judgments, the court of appeals, in consolidated proceedings, reversed both orders, directed that petitioners' ten-year sentences be reinstated, and remanded the prisoners to custody (Pet. App. 6–46). The court held (1) that the district court had exceeded its powers in reducing petitioners' sentences long after the expiration of the period prescribed for the taking of such action by Rule 35 of the Federal Rules of Criminal Procedure (60 days after the imposition of sentence, its affirmance on appeal, or the denial of an application for a writ of certiorari) (Pet. App. 15–17);[12] and (2) that the district court's determination that petitioners' convictions were vulnerable to collateral attack was without substantial support in the record (Pet. App. 18–46). With respect to the latter aspect of its decision, the court held that 28 U.S.C. 2255 may not be used to litigate issues which were or should have been raised on an accused's direct appeal from his conviction (Pet. App. 18); that the only issue presented in the Section 2255 proceedings which under that criterion was cognizable under that section was the alleged suppression of evidence and knowing use of perjured testimony by the prosecuting attorney (Pet. App. 18–21); and that there was no evidence in

[12] The court also held—incidentally to this aspect of its decision—that even if the district court's action in reducing petitioners' sentences had been valid (thus making relevant the statutory provisions relating to good-time credits and allowances) it is the business of the prison authorities, not the courts, to administer these provisions in the first instance. Only if there has been arbitrary action or abuse of authority on the part of the prison authorities in the discharge of their relevant responsibilities, the court held, does it become the function of the courts to intervene (Pet. App. 17–18).

the record from which the district court could reasonably have concluded that this charge had substance (Pet. App. 21–46).

ARGUMENT

1. The court of appeals was manifestly right in holding that the district court exceeded its authority in reducing petitioners' sentences. Rule 35 of the Federal Rules of Criminal Procedure authorizes a sentence to be reduced "within 60 days after the sentence is imposed, or within 60 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 60 days after receipt of an order of the Supreme Court denying an application for a writ of certiorari," and Rule 45(b) specifically forbids enlargement of this period. It is plain, therefore, that the time limit fixed by the rule is inflexible and jurisdictional—as this Court itself has observed. *United States* v. *Robinson,* 361 U.S. 220, 224–226. And see *United States* v. *Hunter,* 162 F. 2d 644, 647–648 (C.A. 7) (cited with approval in *Robinson, supra,* at 226), so holding. It is undisputed that the 60-day period referred to had long since expired when the district court acted. Nothing in 28 U.S.C. 2255 authorizes a court to reduce a sentence. That section deals exclusively with motions to set aside or correct illegal sentences. It has no relevance to a motion to shorten a legal one. *Jenkins* v. *United States,* 325 F. 2d 942, 945–946 (C.A. 3); *Richards* v. *United States,* 212 F. 2d 453, 454 (C.A.D.C.).[13]

[13] A *dictum* in *Kinsella* v. *Looney,* 217 F. 2d 445 (C.A. 10), relied on at Pet. 12, 33–34, to the effect that the trial court had jurisdiction under 28 U.S.C. 2255 to reduce the sentence there involved, although more than 60 days had transpired

2. The court of appeals was also correct in holding that the determination by the district court that petitioners' convictions were vulnerable to collateral attack was without substantial support in the record. The gravamen of petitioners' contentions on this issue—in this Court as in the courts below (Pet. 10–11, 16, 17–20; 2 R. 21–23; and see *supra*, pp. 10, 14–15)—is that agent Richards and the informer, Sussman, "committed perjury with respect to any promises or agreements as to leniency for Sussman if he cooperated with federal agents" (Pet. 16); that this perjury was knowingly used by the prosecutor (Pet. 11, 17); and that the prosecutor, by a "technical objection," suppressed and concealed the relevant truth (*ibid.*). No evidence supports any of these charges. Not only is there no evidence that tainted testimony was wittingly used; there is not the slightest indication that any perjurious testimony—whether known or unknown to the prosecutor—was given. And the record flatly refutes the claim that the prosecutor suppressed or concealed any pertinent fact.

a. The claim that the prosecutor suppressed evidence by a "technical objection" is squarely contradicted by the record. The pertinent incident is described at page 7, *supra*. To the question, asked of agent Richards on cross-examination, whether he had

---

since its imposition, is supported by no other authority, to our knowledge, and none was cited. The court's statement had no relevance to the issue before it—whether two cumulative one-year terms of imprisonment (the sentence as reduced) were supportable by the counts on which they were based. So far as appears, the reduction of the sentence more than 60 days after its imposition had not been opposed.

made "some kind of an agreement" with Sussman during their conversation at the Narcotics Bureau offices following Sussman's arrest, the prosecutor objected on the ground that it "call[ed] for a conclusion of the witness." He made it explicitly clear, however, that he had "no objection to the facts coming out." Indeed, the prosecutor himself attempted to elicit from this witness, on redirect examination, the relevant background "facts," *and was prevented from doing so by defense objections* (*infra*, pp. 20–21).

b. The principal testimony said to have been perjured (Pet. 11) was agent Richards' testimony on cross-examination that neither he nor anyone in his presence had told Sussman that Sussman "would receive a lighter sentence" in the criminal proceeding pending against him if he would cooperate with the agents (5 R. 107).[14] There is not the slightest indication that this testimony was false. Richards did tell Sussman—as he readily acknowledged at the hearing in the collateral proceedings (*supra*, p. 12)—that anything Sussman might do to cooperate with the agents in bringing about the arrest and conviction of

[14] The sole additional testimony claimed to be untrue was Sussman's testimony on cross-examination that he knew he would "probably" get a lighter sentence for his federal offense if he was cooperative (Pet. 10–11; *supra*, p. 6). The theory on which it is contended that this testimony was false is, apparently, that Sussman thereby impliedly denied that there had been an *actual* "bargain" between himself and the agents under which he "would receive" a lighter sentence in return for his cooperation; the contention assumes the existence of the "bargain" (see 2 R. 23). In short, the claim that Sussman perjured himself assumes that Richards testified falsely in denying that any such promise had been made.

his "source of supply" (Marchese) would be brought to the attention of the United States Attorney. But Richards did not deny at the trial that he had made that promise to Sussman.[15] His pertinent testimony was a negative response to a specific question—whether Sussman had been promised "a lighter sentence."

The insubstantiality of the charge of perjury by Richards—and particularly of the claim that the prosecutor sought to suppress evidence—is shown by the fact that the prosecutor, in his redirect examination of this witness, after directing his attention to his denial that Sussman had been told in his presence that he would receive a lighter sentence if he cooperated, asked whether Richards had had any conversation with Sussman to the effect that "the United States Attorney would be contacted to determine what type of counts would be filed against him" if he cooperated. The prosecutor's effort to elicit the facts in this regard—which are the very facts which petitioners now characterize as "suppressed"—were blocked by a defense objection, sustained by the court (*supra*, pp. 8–9). Again, at another point in his redirect examination of Richards, the prosecutor sought to elicit the circumstances surrounding the witness'

---

[15] For this reason, the district court's finding that Richards denied making "*any such* promise, arrangement or assurance" (referring to "some form of promise" by Richards that he "would try to obtain some consideration for" Sussman if the latter would agree to cooperate) (Finding I, Pet. App. 21 (emphasis added); see *supra*, p. 14) is wholly without record support. By the same token, the court's vague correlative finding that "*some such* promise, arrangement or assurance was in fact made" by Richards (*id.*, Pet. App. 21–22 (emphasis added)) is wholly without relevance.

approach to Sussman's State probation officer, on Sussman's behalf, after Sussman had agreed to assist the agents in their further investigations. (This incident related to another of the instances of considerate treatment of Sussman which petitioners later charged the prosecutor with having unfairly suppressed.) Richards—as he readily acknowledged in the collateral proceedings—had told Sussman at the time of his arrest that he would speak to his State probation officer on his behalf if he would agree to cooperate, and the agent did in fact subsequently do so, explaining to the officer that Sussman had agreed to assist the narcotics agents (*supra*, pp. 8–9, 12). At the trial, the prosecutor sought to develop, through Richards, the circumstances surrounding this episode. He was prevented from doing so, however—again by defense objections (the defense contended that the matter was "completely immaterial"). The most that the prosecutor was able to bring out was that Richards and the probation officer had in fact had such a conversation (*supra*, p. 8).

c. Sussman's background, and his motives for cooperating with the authorities and testifying for the government at petitioners' trial, were brought out in great detail at the trial through the usual process of examination and cross-examination. Among other things, the fact that Sussman had a federal criminal case pending against him at the time he consented to cooperate, his probationary status under a prior State narcotics conviction, his release on his own recognizance after agreeing to assist the authorities, his personal addiction to narcotics, his receipt of govern-

ment funds during the period of his cooperative activities, his eventual plea of guilty to the federal charges, and the lenient sentence imposed on those charges were all fully developed at the trial (*supra*, pp. 5–7). Obviously it was within the power of petitioners' trial attorneys to develop further facets of these background matters had they wished to do so. The simple fact is that they had no such desire.[16]

3. There is no merit to petitioners' claims that the court of appeals' decision is inconsistent with this Court's remand in *Marchese* v. *United States*, 374 U.S. 101, or with the decision in *Sanders* v. *United States*, 373 U.S. 1. All that the *Sanders* decision and the remand of the *Marchese* case required was that the courts below consider on the merits those claims which had not previously been made (so long as they were not deliberately withheld by petitioners) and repetitious claims to the extent that the ends of justice required their consideration. In the present case, subject to a qualification to be mentioned, the court of appeals passed—after a full hearing in the district court—on the challenges to petitioners' convictions which had not previously been asserted and refused

[16] The reason for counsel's disinterest in this regard is not difficult to understand. Despite the stress which has been laid by petitioners' later attorneys (in the collateral proceedings) on the importance of the factors which moved Sussman to assume the informer's role, the fact is that these factors were of no great moment at the trial. For the key points in Sussman's testimony were fully corroborated by the testimony of the State and federal officers, who kept Sussman constantly under surveillance as he helped them gather the incriminating evidence. Moreover, Sussman's motives for cooperating and for testifying on the government's behalf were clearly understood by everyone at the trial.

to consider those which had been litigated on direct appeal. Petitioners suggested to the court no sound reasons to believe that the "ends of justice" warranted reconsideration of the latter. The claims that petitioners were "ensnare[d]" (Pet. 7, 16), that the evidence obtained through use of the concealed radio transmitter was inadmissible because illegally procured (Pet. 20–23), that agent Richards' "interception" of telephone messages between Marchese and Sussman was unlawful (Pet. 24–25), and that the officers' search without warrant of Marchese's person and apartment and a like search of an automobile of Del Bono's violated the accused's Fourth Amendment rights (Pet. 23)—were, with one exception, all fully litigated on petitioners' direct appeals from their convictions (*supra*, p. 9). The court of appeals was clearly right, therefore, in holding that petitioners had no right to relitigate these issues in collateral proceedings under 28 U.S.C. 2255 (Pet. App. 18–20). See, *e.g.*, *Medrano* v. *United States*, 315 F. 2d 361, 362 (C.A. 9), certiorari denied, 375 U.S. 854.[17]

The exception—the claim that certain searches were illegal—involved, at most, a question of trial error in the admission of evidence. It presented nothing cognizable in collateral proceedings. As observed in *Davis* v. *United States*, 214 F. 2d 594, 596 (C.A. 7), certiorari denied, 353 U.S. 960, "a motion for vacation of a judgment and sentence under 28 U.S.C.

[17] The fact that the court of appeals, on the direct appeal, affirmed the convictions without opinion (264 F. 2d 892) obviously does not mean—as petitioners argue (Pet. 34)—that the court "did not pass upon" the issues raised in the appeal.

§ 2255 cannot be used in lieu of an appeal to correct errors committed in the course of a trial, even though such errors relate to constitutional rights * * *." The admission of evidence alleged to have been unlawfully seized may not be made the basis of a collateral attack on a conviction. *Warren* v. *United States*, 311 F. 2d 673, 675–676 (C.A. 8); *Williams* v. *United States*, 307 F. 2d 366, 367 (C.A. 9); *United States* v. *Scales*, 249 F. 2d 368, 370 (C.A. 7), certiorari denied, 356 U.S. 945; *Davis* v. *United States*, 214 F. 2d 594, 596 (C.A. 7), certiorari denied, 353 U.S. 960; *United States* v. *Walker*, 197 F. 2d 287, 288 (C.A. 2), certiorari denied, 344 U.S. 877.[18]

---

[18] There is at all events no substance to this contention. The only "search" which yielded evidence was, as the petition acknowledges (Pet. 23), the alleged search of Del Bono's automobile. The pertinent incident—Sussman's removal of narcotics from the trunk of this vehicle pursuant to his arrangement with Marchese and at the latter's direction (*supra*, p. 5)—involved no search at all in any ordinary sense, even though Sussman was acting at the time in his capacity as a "special employee" of the Narcotics Bureau, and promptly delivered the narcotics to the officers. Moreover, Del Bono, who under any hypothesis would alone have had standing to complain of this incident (cf. *Jones* v. *United States*, 362 U.S. 257, 261), did not raise this issue in the collateral proceedings (*supra*, pp. 10, 15, including notes 5 and 11).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

PHILIP R. MONAHAN,
Attorney.

JULY 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965